

# 10-3165-cv, 10-3191-cv, 10-3213-cv

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**United States Court of Appeals  
For the Second Circuit**

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RED EARTH, LLC, ET AL.,

*Plaintiffs – Appellees/Cross-Appellants,*

vs.

UNITED STATES OF AMERICA, ET AL.,

*Defendants-Appellants/Cross-Appellees,*

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**On Appeal From The United States District Court  
For The Western District Of New York**

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**BRIEF OF AMICUS CURIAE SENECA NATION OF INDIANS  
IN SUPPORT OF PLAINTIFFS-APPELLEES/CROSS-APPELLANTS**

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**DISCLOSURE STATEMENT**

*Amicus Curiae* the Seneca Nation of Indians states that it has no parent corporation and no publicly held corporation owns stock in the Seneca Nation of Indians.

/s/ Carol E. Heckman  
Carol E. Heckman

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## INTRODUCTION AND INTEREST OF *AMICUS CURIAE*<sup>1</sup>

*Amicus Curiae* the Seneca Nation of Indians (the “Nation”) respectfully submits this brief in support of Plaintiffs-Appellees/Cross-Appellants.<sup>2</sup>

The Nation exercises comprehensive regulatory and law enforcement jurisdiction over the tobacco economy in its Territories in Western New York in cooperation with the United States Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”). This economy represents a considered use by the Nation of its treaty-protected lands for its members’ benefit, and the Nation’s self-regulation represents the exercise of its sovereign right “to make [its] own laws and be ruled by them,” *Williams v. Lee*, 358 U.S. 217, 220 (1959). To protect these sovereign interests and to provide the Court with unique information that it has not received from the parties, the Nation submits this *amicus curiae* brief in support of the Plaintiffs-Appellees/Cross-Appellants.

The Nation actively coordinates its own regulatory and law enforcement activities with those of the ATF and of other responsible governments. This cooperative relationship is grounded in the United States’ solemn promise to

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<sup>1</sup> In accordance with Local Rule 29.1, *Amicus Curiae* Seneca Nation of Indians states that no party’s counsel authored this brief in whole or in part, and no party or party’s counsel contributed money that was intended to fund preparing or submitting this brief. Other than *amicus curiae*, its members, or its counsel, no person contributed money that was intended to fund preparing or submitting this brief.

<sup>2</sup> This brief is filed with the consent of all parties.

defend the Nation's "free use and enjoyment" of its Territories, Treaty of Canandaigua, art. 3, Nov. 11, 1794, 7 Stat. 44, 45, and in Executive Order 13175, 65 Fed. Reg. 67,249 (Nov. 6, 2000), which requires "regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications, [and] to strengthen the United States government-to-government relationships" with Indian nations.

It was in this spirit of cooperation that the Nation approached the United States following the passage of the PACT Act for guidance regarding the implementation and enforcement of the Act on the Nation's Territories. The Nation urged the Department of Justice to bring clarity and certainty to the absurdly vague legal landscape created by the Act prior to its effective date (June 29, 2010) in order to prevent federal, state, and local officials from construing the Act in a manner that would be inconsistent with the unique rights of the Nation and its members or that would devastate the livelihoods of scores of Seneca retailers and thousands of employees in Western New York developed in good faith reliance upon those rights. The necessary clarity has not yet been obtained, however, and the Nation respectfully submits that a preliminary injunction is therefore warranted.

## ARGUMENT

### I. THE NATION’S HIGHLY REGULATED TOBACCO ECONOMY AND COOPERATIVE LAW ENFORCEMENT RELATIONSHIP WITH THE ATF.

In 2006, the Seneca Nation enacted a comprehensive cigarette stamping, regulatory, and law enforcement program that strictly governs the importation, exportation, and sale of all cigarettes on the Nation’s Territories—the Seneca Nation of Indians Import-Export Law and Import-Export Regulations (collectively, “IEL”), which is implemented and enforced by the Seneca Nation of Indians Import-Export Commission (“Commission”). *See* July 16, 2010 Declaration of Robert Odawi Porter (“*Porter Dec.*”), at ¶ 6 (available in the district court record in W.D.N.Y. Civ. Action No. 10-530, where it is listed as Docket No. 42-2). Pursuant to the IEL, cigarettes may only be imported into the Nation’s Territories by stamping agents licensed by the Commission or by the Commission itself, both of which must affix a unique, traceable Seneca Nation stamp to each package of cigarettes. *See id.* at ¶ 6. The six separate security features of the Seneca Nation stamp (watermark, chemical reagent, variable image, variable color, microprint, and an embedded magnetic symbol) are amongst the most sophisticated in the United States and exceed those of the State of New York stamp. *See id.* The Nation imposes an administrative fee of



seventy-five cents on each carton of cigarettes, which fees are dedicated to health and education programs provided on the Nation's Territories. *See id.*

Each month, Nation-licensed stamping agents must report to the Commission (1) the quantity, brand, and type of cigarettes stamped, (2) the date on which those cigarettes were stamped and the retail location to which they were delivered, and (3) the lot numbers of the stamps affixed to those cigarettes. *See id.* Only after cigarettes have been affixed with a Nation stamp may they be distributed to licensed retailers on the Nation's Territories, which retailers include the Nation itself. *See id.* The IEL prohibits retailers from, *inter alia*, selling cigarettes to minors, selling cigarettes below the Nation's minimum pricing structure, and selling cigarettes in wholesale quantities to any person, Indian or non-Indian. *See id.* at ¶ 7. The IEL also prohibits retailers from selling cigarettes "to any person outside of Nation territory in a manner that has been determined to violate . . . applicable federal law." *See id.* at ¶ 7 & Ex. A, § 1.18(c). The IEL further provides that cigarettes found on the Territories and bearing a non-Seneca stamp are contraband subject to seizure by the Commission and subject to forfeiture. *See id.* at ¶ 7.

Upon the adoption of the IEL, the Seneca Nation met on a government-to-government basis with the ATF and the United States Attorney for the Western District of New York to discuss the Nation's regulatory and law

enforcement plans with respect to all cigarette trafficking and sales activities on the Nation's Territories, and to request the United States' support for its plans. *See id.* at ¶ 8. Because the United States is the Seneca Nation's treaty partner and also regulates the sale of tobacco products, the Nation believed that this would be the most natural and productive alliance. *See id.* Since that initial meeting, the ATF and the Seneca Nation have met on several occasions and have routinely shared confidential law enforcement information to facilitate their respective enforcement of federal law and the IEL, and the ATF has visited the Commission's offices to witness its stamping operations. *See id.* at ¶¶ 9-12.

In 2007, soon after the Nation seized over 60,000 cartons of non-Seneca stamped cigarettes with an estimated value of approximately \$1.5 million, the ATF invited the Nation to participate in an international Contraband Tobacco Information Sharing Summit of federal, Canadian, state, provincial, and local law enforcement agencies. *See id.* at ¶ 10. The Nation's cooperative relationship with the ATF has proved fruitful to both the ATF and the Nation, leading to numerous investigations, contraband cigarette seizures, and related prosecutions. *See id.* at ¶¶ 9-11; *see also, e.g., United States v. Lloyd Long*, 1:08-cr-00174-RJA (W.D.N.Y. filed July 10, 2008).

The Nation also has worked cooperatively and coordinated law enforcement activities with other federal and state agencies, including the United States Postal Service, local law enforcement, and the New York State Department of Taxation and Finance (“DTF”). *See Porter Dec.* at ¶ 9. For example, in April 2008, a joint investigation of the ATF, the Seneca Nation, and the DTF led to the seizure of massive quantities of non-State stamped, non-Seneca stamped cigarettes being diverted through the Nation’s Territories to the Peace Pipe Smoke Shop on the Poospatuck Reservation on Long Island. *See id.* at ¶ 11; *Gutlove & Shirvint, Inc.*, Nos. 822533 & 822921, FOF 11 (N.Y. Div. Tax App. June 2, 2009) (Amended Determination), *available at* <http://www.nysdta.org/Determinations/822533.det.amd.htm> (last visited October 13, 2010). The ATF has since shared with the Nation its view that the diversion of contraband cigarettes through the Territories has effectively ended as a result of the Nation’s implementation and enforcement of the IEL and the Nation’s work with the ATF. *See Porter Dec.* at ¶ 12.

When Congress was considering passage of the PACT Act, the Nation opposed the measure and sought to educate Congress with respect to its effective self-regulation and the law enforcement relationships it had forged with the ATF and others to combat unlawful cigarette trafficking—the Congress, however, refused the Nation’s request for a hearing on the impact of

the Act on the Seneca Nation and the rest of Indian country. *See id.* at ¶ 15.

Nevertheless, upon the Act's passage, the Nation turned to its treaty partner in the spirit of government-to-government cooperation in an effort to clarify how the Act would be implemented and enforced on the Nation's Territories consistent with the IEL and with the rights of the Nation and its members. As discussed below, the United States has not yet met with the Nation to respond to the Nation's questions and concerns.

**II. THE NATION'S EFFORTS TO CONSULT WITH THE UNITED STATES REGARDING THE INDETERMINATE LEGAL OBLIGATIONS IMPOSED BY THE PACT ACT ON NATION-LICENSED RETAILERS.**

The Nation has sought to bring fairness and clarity to the implementation of the PACT Act on the Nation's Territories through consultation with the arms of the United States government charged with implementing and enforcing the heart of the Act—the United States Attorney General, the Department of Justice, and the ATF. To date, however, these agencies have provided no guidance to the Nation or its members with respect to the complex jurisdictional questions raised by the Act. This failure to meaningfully consult on a government-to-government basis with the Nation is particularly troubling and fundamentally unfair in the context of the PACT Act, which unquestionably has a grossly disproportionate impact on scores of Nation-licensed retailers and,

thousands of employees, and their prominent role in the Western New York economy.<sup>3</sup>

On June 8, 2010, Nation representatives traveled to Washington, D.C. to voice the Nation’s concerns (described in greater detail below) to the United States Department of Justice and ATF officials, including the Executive Assistant Director of the ATF and the Associate ATF Chief Counsel, regarding the proper interpretation and implementation of the Act on the Nation’s Territories. *See Porter Dec.* at ¶ 16. At the meeting, the United States indicated that the “ink was not dry” on the Act, that it would consider accommodations for the Nation-licensed retailers to ease implementation of the Act, and that the Nation should not “worry” about prosecutions commencing immediately upon the Act’s effective date while regulations were being

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<sup>3</sup> Contrary to the suggestion of the United States and its *amici*, National Association of Convenience Stores and New York Association of Convenience Stores, Nation-licensed retailers are not required to collect New York cigarette tax on sales to out-of-state consumers. New York law unequivocally provides that such sales are tax-exempt. *See, e.g.*, 20 N.Y.C.R.R. § 74.1(c)(4) (“no tax will be imposed under article 20 of the Tax Law on cigarettes sold . . . to out-of-state purchasers”); 20 N.Y.C.R.R. § 76.1(a)(1) (“The tax on cigarettes possessed for sale is not required to be paid on cigarettes sold to . . . out-of-state purchasers”). The assertion that these retailers are unlawfully exploiting a tax exemption is therefore erroneous as a matter of law. Moreover, prior to the PACT Act, it was well-established federal law that Nation-licensed retailers had no obligation to collect and remit taxes to the states to which they were shipping cigarettes to individual consumers. *See Hemi Group, LLC v. City of New York*, \_\_\_ U.S. \_\_\_, 130 S. Ct. 983, 994 (2010) (Ginsburg, J., concurring).

formulated and a complete response to Indian Country concerns being developed. *See id.*

The Department of Justice also invited written comments by June 18, 2010 on a proposed interim rule implementing the Act. *See id.* at ¶ 17.

Although the Nation submitted timely comments, *see id.* at ¶ 17 & Ex. C, it has received no direct response, *see id.* at ¶ 18. Nor has the Department of Justice proposed or adopted any interim or permanent rule that would clarify its views on the vague provisions of the Act or that would provide guidance to Nation-licensed retailers as to how to conform their business practices to the Act in light of their unique federally-protected rights. *See id.* Similarly, well before the Act's effective date of June 29, 2010, the Nation requested a meeting with the ATF New York Field Division and the United States Attorney for the Western District of New York with the hope of working toward a mutually agreeable resolution regarding the implementation and enforcement of the Act on the Nation's Territories. *See id.* at ¶ 19. The Nation, however, was told that the earliest date for such a meeting would be at the end of July, one month after the Act's effective date and the risk of substantial criminal and civil liability accompanying it. *See id.*

In its written comments to the Department of Justice in June, the Nation conveyed the tremendous legal uncertainty created for Nation-licensed retailers

by the PACT Act. For example, the Act purports to require remote sellers to comply with “all state, local, tribal, and other laws generally applicable to sales of cigarettes or smokeless tobacco as if the delivery sales occurred entirely within the specific state and place [to which they are delivered], including laws imposing . . . excise taxes . . . licensing and tax-stamping requirements . . . [and] other payment obligations or legal requirements relating to the sale, distribution, or delivery of cigarettes or smokeless tobacco.” 15 U.S.C.

§ 376a(a)(3). The Act also purports to subject the records of all remote sellers to unfettered access by “tobacco tax administrators of the States, [by] local governments and Indian tribes that apply local or tribal taxes on cigarettes or smokeless tobacco, [by] the attorneys general of the States, [by] the chief law enforcement officers of the local governments and Indian tribes.” 15 U.S.C.

§ 376a(c)(3). The violation of these provisions subjects the seller to substantial criminal penalties. *See* PACT Act, Pub. L. No. 111-154, 124 Stat. 1087, 1100-01 (to be codified at 15 U.S.C. § 377).

Congress, however, expressly conditioned these requirements on the vast body of federal and state law that strictly limits state and local jurisdiction over Indian nations and their members in Indian country:

Nothing in this Act . . . shall be construed to amend, modify, or otherwise affect . . . any limitations under Federal or State law, including Federal common law and treaties, on State, local, and tribal tax and regulatory authority with respect to the sale, use, or

distribution of cigarettes and smokeless tobacco by or to Indian tribes, tribal members, tribal enterprises, or in Indian country . . . [or] any Federal law, including Federal common law and treaties, regarding State jurisdiction, or lack thereof, over any tribe, tribal members, tribal enterprises, tribal reservations, or other lands held by the United States in trust for one or more Indian tribes; or . . . any State or local government authority to bring enforcement actions against persons located in Indian country.

15 U.S.C. § 375, historical and statutory notes (PACT Act, Pub. L. No. 111-154, 124 Stat. 1087) (Exclusions Regarding Indian Tribes and Tribal Matters).

Moreover, “[a]ny ambiguity between the language of this section or its application and any other provisions of this Act shall be resolved in favor of this section.” *Id.*

Nearly two centuries of federal common law teaches that states generally lack jurisdiction to regulate Indian nations and their members in Indian country. *See, e.g., Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 764 (1985) (“As a corollary of [exclusive federal] authority [over relations with Indian tribes], and in recognition of the sovereignty retained by Indian tribes even after formation of the United States, Indian tribes and individuals generally are exempt from state taxation within their own territory.”); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331-32 (1983) (noting that “a State may assert jurisdiction over the on-reservation activities of tribal members” only in “exceptional circumstances” and that “[b]ecause of their sovereign status, tribes and their reservation lands are insulated in some respects by an



‘historic immunity from state and local control’”) (citations and internal quotation marks omitted); *McClanahan v. State Tax Comm’n of Arizona*, 411 U.S. 164, 168 (1973) (“[T]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation’s history.”) (quoting *Rice v. Olson*, 324 U.S. 786, 789 (1945)); *Warren Trading Post Co. v. Arizona Tax Comm’n*, 380 U.S. 685, 686-87 (1965) (“[F]rom the very first days of our Government, the Federal Government had been permitting the Indians largely to govern themselves, free from state interference[.]”); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832) (“The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force[.]”); *Cohen’s Handbook of Federal Indian Law* § 6.03[1][a], at 520 (2005 ed.) (“A state ordinarily may not regulate the property or conduct of tribes or tribal-member Indians in Indian country.”).

Accordingly, with respect to the collection of taxes on cigarettes sold by Indians in Indian country, the United States Supreme Court has upheld only “minimal burdens reasonably tailored to the collection of valid taxes from non-Indians.” *Dep’t of Taxation & Fin. v. Milhelm Attea & Bros.*, 512 U.S. 61, 73 (1994). Innumerable state and local “laws generally applicable to sales of cigarettes,” 15 U.S.C. § 376a(a)(3), unquestionably exceed this minimum-

burden threshold. For example, federal and state courts have held that licensing and inspection requirements cannot be enforced against Indian reservation retailers. *See, e.g., Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 480-81, 483 (1976) (holding that the state could not apply licensing fee to on-reservation tribal cigarette businesses); *New York Ass’n of Convenience Stores v. Urbach*, 275 A.D.2d 520, 522 (N.Y. App. Div. 3d Dep’t 2000) (“Because of tribal immunity . . . State auditors cannot go on the reservations to examine the retailers’ records. . . . Additionally, the Department cannot compel the retailers to attend audits off the reservations or compel production of their books and records for the purpose of assessing taxes.”), *leave to appeal denied*, 756 N.E.2d 78 (N.Y. 2001), *cert. denied*, 534 U.S. 1056 (2001); *Oklahoma Tax Comm’n v. Bruner*, 815 P.2d 667, 669-70 (Okla. 1991) (holding that the state lacks authority to impose license and permit requirements on Indian cigarette retailers).

Each of the approximately thirty-four states with Indian country within their borders has its own body of statutory and common law regarding the extent of that state’s civil and criminal jurisdiction in Indian country, in addition to the substantial body of federal statutory and common law regarding the

same.<sup>4</sup> As New York’s own experience amply illustrates, achieving legal certainty with respect to the application of just one state’s cigarette tax laws in Indian country is no simple feat. *See generally Cayuga Indian Nation of New York v. Gould*, 930 N.E.2d 233, 14 N.Y.3d 614 (N.Y. 2010) (discussing the history of and construing the New York cigarette tax as applied to on-reservation sales by Indian retailers to non-Indians, and making clear the significant limitations under New York law on the application of the New York tax to reservation sales). By the United States’ own estimate, absent guidance from the Department of Justice and the ATF, Nation-licensed retailers would be required to conduct this analysis with respect to the “laws generally applicable to sales of cigarettes” in up to 550 different jurisdictions. Moreover, even if a Nation-licensed retailer could identify these laws and determine whether they impose more than “minimal burdens” on its activities, the PACT Act fails to address how a retailer potentially subject to the laws of three different sovereigns—the Seneca Nation, the State of New York, and the state to which the retailer is delivering cigarettes—should resolve conflicts that arise among those laws. Thus, as Plaintiffs-Appellees/Cross-Appellants have argued, the vagueness inherent in the PACT Act makes it impossible for a Nation-licensed

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<sup>4</sup> By the same token, there are approximately sixteen states with no Indian country within their borders. These states likely have no understanding of the limitations on their jurisdiction over Indians in Indian country, and present a serious risk of unjustified enforcement action under the PACT Act.

retailer to discern whether it must modify its business practices to comply with the Act, and, if so, under what circumstances and to what extent.

Indeed, the District Court found—and the United States has not challenged—that “provisions of the PACT Act [are] so onerous that compliance with the Act threaten[s] the continued viability of [Plaintiffs’] established businesses.” *See* District Court’s Aug. 12, 2010 Order Denying Motions for Stay and Injunction Pending Appeal (listed as Docket No. 61 in W.D.N.Y. Civ. Action No. 10-530), at 6. The District Court had similarly determined in its July 30, 2010 Preliminary Injunction Order that the PACT Act had already and would continue to force cigarette retailers to shut down their operations, and that such consequences constitutes irreparable harm. *See, e.g.*, District Court’s July 30, 2010 Preliminary Injunction Order (listed as Docket No. 45 in W.D.N.Y. Civ. Action No. 10-530), at 8; *id.* at 40 (“If this Act is permitted to take effect, remote cigarette retailers will be put out of business” and “most retailers will be forced to shut down operations if injunctive relief is denied”).<sup>5</sup>

For these reasons, and because the Nation firmly believes that the intrusion of the laws of up to 550 different jurisdictions into its Territories

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<sup>5</sup> The District Court also explained that “plaintiffs demonstrated that the burden of complying with hundreds or thousands of taxing schemes, and the cost associated with doing so, far outweighs the public interest in having the state and local taxes paid in advance.” District Court’s Aug. 12, 2010 Order Denying Motions for Stay and Injunction Pending Appeal (listed as Docket No. 61 in W.D.N.Y. Civ. Action No. 10-530), at 5.

would unlawfully interfere with the Nation's "ability to exercise its sovereign functions," *Ramah Navajo School Bd., Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832, 837 (1982), the Nation has sought to engage the United States in a government-to-government discussion regarding the implementation and enforcement of the PACT Act. To date, however, since the June 8, 2010 meeting when the Nation was told not to "worry" and that the "ink was not dry" on the PACT Act, meetings with the Nation, the U.S. Department of Justice, the ATF, and the United States Attorney for the Western District of New York have not happened. The Nation's goal for such a meeting is for clarity, and for a construction of the Act that respects each treaty partner's respective laws, rights, and interests.

## CONCLUSION

The Nation's commitment to combating unlawful cigarette trafficking in cooperation with the United States should not be questioned—nor should the Nation's commitment to working with the United States to resolve the tremendous legal uncertainty inherent in the PACT Act. The Nation urged such resolution *prior* to the effective date of the Act, or at a minimum, sought the delayed implementation and enforcement of the Act while the United States works toward that resolution. To date, however, the United States has offered no sign that it intends to address the Nation's questions and concerns in any

meaningful fashion, or to defend the Nation's sovereignty, its economy, and the rights of its members from unwarranted interference. In the absence of any written guidance, the Plaintiffs and other Nation-licensed businesses are operating in the dark, at the mercy of the federal, state, and local officials empowered by Congress to enforce the Act's felony criminal and substantial civil penalties. Accordingly, the Seneca Nation of Indians supports Plaintiffs-Appellees/Cross-Appellants in this appeal.

October 19, 2010

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## **CERTIFICATE OF COMPLIANCE**

I certify that the foregoing brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(d). The brief is composed in a 14-point proportional type face, Times New Roman. As calculated by my word processing software (Microsoft Word), the brief contains 3,921 words. This word count excludes the disclosure statement, table of contents, table of authorities, and signatures and certificates of counsel.

/s/ Carol E. Heckman  
Carol E. Heckman

### **CERTIFICATE OF SERVICE**

I certify that on this 19th day of October, 2010, I caused the foregoing Brief of Amicus Curiae Seneca Nation of Indians to be filed with the Court through the CM/ECF system. All counsel of record are registered ECF users.

/s/ Carol E. Heckman  
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